IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
February 19, 2009 Session

STATE OF TENNESSEE DEPARTMENT OF CHILDREN'S SERVICES v. KRISTI HUFFINES-DALTON, ET AL.

Appeal from the Circuit Court for Jackson County
No. 1823-P-47 Clara Byrd, Judge

No. M2008-01267-COA-R3-JV - Filed June 15, 2009

The Department of Children Services initiated a proceeding to declare the two minor children of divorced Mother and Father dependent and neglected following an altercation in which Mother shot Father while the children were present. The children's maternal grandparents and maternal great aunt and uncle intervened seeking custody of the children. The Juvenile Court for Jackson County declared the children dependent and neglected and issued an order restraining Mother from being near the children except for two hours per week of DCS-supervised visitation. The maternal great aunt and uncle, with whom the children had lived since the shooting, were named the children's primary residential custodians. Father appealed. Following a *de novo* hearing, the circuit court adjudicated the children dependent and neglected. The court also found that Mother committed severe child abuse and that aggravated circumstances existed, and, therefore, pursuant to Tenn. Code Ann. § 37-1-166(g)(4)(A) the Department was no longer required to make reasonable efforts to assist Mother in obtaining services so she could be reunited with her children. The court designated Father as primary residential parent of the children with Mother to receive two hours per week of DCS-supervised visitation; Mother was also ordered to pay child support to Father. Mother and the intervening petitioners appealed. We affirm in part and remand for further proceedings.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part and Remanded

RICHARD H. DINKINS, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P. J., M.S. and ANDY D. BENNETT, J. joined.

Amy V. Hollars, Livingston, Tennessee, for the appellant, Kristi Huffines-Dalton
Daryl A. Colson, Livingston, Tennessee, for the appellants, Danny and Gail Huffines and Amanda and Matthew Scoggins

Michael M. Raulston, Chattanooga, Tennessee, for appellee, Christopher Dalton.

Robert E. Cooper, Jr., Attorney General and Reporter, Michael E. Moore, Solicitor General, and Preston Shipp, Assistant Attorney General, Nashville, Tennessee, for the appellee, Tennessee Department of Children's Services

OPINION

I. Factual and Procedural Background

Christopher Dalton ("Father) and Kristi Huffines-Dalton ("Mother") were divorced in 2004, with Mother being designated primary residential parent and Father being granted parenting time. In March 2006, the Department of Children Services ("DCS" or "the Department") received a referral alleging that Father had sexually abused the children; an investigation was initiated and Father's visitation suspended pending the outcome of the investigation.[1] In May 2006, DCS completed its investigation, finding the case to be unfounded. Father's visitation did not resume, however, and on August 14, 2006, the General Sessions Court for Clay County ordered Mother to permit Father to pick up the children on August 18. On the evening of August 18, Father went to Mother's home; his mother and current wife accompanied him, but remained in the car when he went to the front door. Father carried a digital recording device with him, which he hid in his clothing. After entering the house, an altercation with Mother ensued. Mother fired a gun ten times and Father suffered five gunshot wounds; bullet holes were found in the living room and kitchen area of the home. The children were in a bedroom in the home at the time of the shooting.

DCS received a referral regarding the shooting incident and attempted to investigate, but Mother and Matthew and Amanda Scoggins, the children's maternal great aunt and uncle, refused to permit DCS access to the children and the home where the children were living in order for the Department to investigate.[2] DCS sought and obtained an order on August 22, 2006, compelling Mother to cooperate with DCS and its investigation. Following an investigation by the Tennessee Bureau of Investigation ("TBI") and the Jackson County Sheriff's Department, Mother was charged with attempted first degree murder, aggravated assault, and filing a false report.[3]

On September 18, 2006, DCS filed a petition in Jackson County Juvenile Court to declare the two minor children of Mother and Father dependent and neglected. The petition sought protective supervision of the children and a restraining order against Mother; it alleged that the "children are subjected to immediate threat to their safety . . . if Kristi Huffines-Dalton continues to have access to the children in that Kristi Huffines-Dalton have [sic] placed the children at substantial risk of physical injury." The Petition averred that "it is in the children's best interest to stay in the home with the father so long as the father is supportive, and there is a very stringent Protective

[1] The record is not clear as to whether Father's visitation was suspended by order of the court which granted the divorce, by a proceeding initiated by Mother or if DCS initiated the suspension pending its investigation.

[2] The children began living with the Scoggins after the shooting.

[3] At the time of the circuit court proceeding, Mother's criminal charges were still pending.

Supervision Plan ordered by the Court . . . and a No Contact/Restraining Order against the mother, Kristi Huffines-Dalton." On the same day the Petition was filed, the Juvenile Court entered an Ex Parte Temporary Restraining Order restraining Mother from "coming about the person, residence or school of the above-named children or anywhere the children may be" and ordering the children be made wards of the court and "that primary residential parenting of the children shall be with the current custodians, Amanda and Matthew Scoggins."

On October 20, 2006, Danny and Patricia Huffines, the children's maternal grandparents ("1st Intervenors") filed a Motion to Intervene and an Intervening Petition requesting the juvenile court issue an order placing the children in their care, custody and control "in the event that the Court feel[s] that the natural mother should have limited contact with the children." On October 21, 2006, Matthew and Amanda Scoggins ("2nd Intervenors") filed a Motion to Intervene and an Intervening Petition asking the court to extend the August 18, 2006, order placing the children with them "in the event that the Court feel[s] that the natural mother, father, and the maternal grandparents should not have any contact with the children or be deemed to be a suitable placement."

A hearing was held on October 30, 2006. An order on the petition was entered on December 5, 2007,[4] granting the two motions to intervene, finding that the children were dependent and neglected as a result of the shooting, and determining that it was in the best interest of the children to remain in the custody of the Scoggins. The juvenile court ordered Father's existing visitation under the divorce decree to continue, though it required Father's visitation with the children to be supervised by Father's parents until Father completed anger management classes, and ordered Father to pay child support to the Scoggins instead of Mother. The juvenile court continued the restraining order against Mother, but permitted two hours of DCS-supervised visitation per week and allowed Mother to attend church with the children in the presence of the Huffines and Scoggins. Finally, the juvenile court permitted the Huffines visitation, including overnight visitation, with the children so long as Mother was not present. Father appealed to the Jackson County Circuit Court,[5] which held a *de novo* hearing on May 13 - 14, 2008.

At the *de novo* hearing, the court heard testimony from the following witnesses called by DCS: Nikki Young, DCS case manager; Russ Winkler, TBI investigator; Aaron Thomas, Jackson County Juvenile and Circuit Court Clerk; Dr. David Solovey, psychologist; Summer Kinnard, DCS case manager; Amanda Kozak, Polk County DCS case manager; and the two children. DCS also

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[4] The record does not indicate the reason for the delay other than Mother's counsel's explanation during the circuit court hearing that "I circulated an order . . . and it was unsigned for a year and finally in November of 2007 [the Department's counsel] submitted one, and I submitted one, Judge Cook signed mine."

[5] Father first filed a Notice of Appeal on November 6, 2006, and then, following the entry of the order on December 5, 2007, filed a corrected notice of appeal on December 14, 2007. The record also contains a Notice of Appeal filed by Father dated December 13, 2007, and stamped filed on December 17, 2007. While Father's Notice of Appeal states that Father appeals the findings of the Juvenile Court of DeKalb County, Tennessee, there is no dispute that Father was appealing the order of the Juvenile Court of Jackson County. Also, despite the multiple notices of appeal, the parties do not dispute that Father's notice of appeal to the Circuit Court of Jackson County was timely filed.

called Mother to testify, but Mother invoked her 5th Amendment privilege and would not testify. At that point in the proceedings, the court announced that, since the Department had not alleged or put on any proof with regard to the unfitness or substantial harm of Father, the court was required by law to dismiss the petition with regard to Father. The Court stated: "if I have no grounds to grant the petition against the father, then there is no dispositional hearing, because there has been no proof put on that he is in [any] way a harm to these children." The court then made its oral findings of fact and conclusions of law, which were memorialized in an order entered on May 15, 2008.

In its order, the court made twenty-five findings of fact and concluded that "there is clear and convincing evidence that the children . . . have been exposed to substantial harm in their Mother's home," and that "[t]here is clear and convincing evidence that [the children] are dependent and neglected pursuant to Tenn. Code Ann. section 37-1-102(b)(12) et seq. . . . because of the Respondent Mother's conduct." The court also concluded that "the Respondent Father has not engaged in any conduct which would deprive him of his parental rights." The order also stated that because the court found the children to be dependent and neglected by reason of abuse or neglect under Tenn. Code Ann. § 37-1-102(b)(12)(G), the court was required by Tenn. Code Ann. § 37-1-129(a)(2) to determine whether or not Mother committed severe child abuse; the court found that "the Respondent Mother has perpetrated severe child abuse against these children pursuant to Tenn. Code Ann. § 37-1-102(b)(21)(A)." Because the court found Mother subjected the children to aggravated circumstances as defined by Tenn. Code Ann. § 36-1-102, which includes severe child abuse, *see* Tenn. Code Ann. § 36-1-102(9), it held that "the Department was not required to make reasonable efforts to provide services to [Mother]" pursuant to Tenn. Code Ann. § 37-1-166(g)(4)(A). While the court relieved the Department of further responsibility to assist Mother regarding services, it set out requirements for Mother to accomplish in order to increase her visitation: (1) risk assessment as to her potential harm to the children; (2) the possible batterer's intervention course; (3) counseling which would address all of the issues and (4) resolution of the criminal charges.

The court concluded that "for disposition the children should be restoration [sic] of legal custody to the Respondent Father." Citing the court's discretionary powers with respect to visitation, the court allowed that, notwithstanding the determination that Mother committed severe child abuse, Mother "shall have supervised visitation with the children two hours per week at times and places determined upon consultation with the Guardian ad litem and the Department."

Mother, the Huffines, and the Scoggins all appeal the order of the Circuit Court.

II. Issues on Appeal

Mother asserts five issues on appeal:

> 1. Did the trial court deprive Ms. Huffines-Dalton of due process by issuing its ruling at the close of the Department's proof and declining to allow her to present proof in her defense?

2. Did the trial court err in denying Ms. Huffines-Dalton's motions for recusal?
3. Did the trial court err by refusing to permit counsel for Ms. Huffines-Dalton to make an offer of proof?
4. Did the trial court abuse its discretion by disallowing questions regarding the authenticity of the audiotape played at trial?
5. Did the trial court err in ruling that Ms. Huffines-Dalton committed severe child abuse?

The Intervenors, the Huffines and the Scoggins, articulate four issues on appeal:

1. Did the trial court commit reversible error in making statements of credibility about a party defendant prior to the conclusion of the case and the conclusion of all the proof?
2. Did the trial judge commit reversible error in refusing to recuse herself after making such statements about a party defendant?
3. Did the trial judge commit reversible error by refusing to allow the Respondent and Intervening Petitioners an opportunity to respond to the proof and present proof presented by [sic] the State of Tennessee, Department of Children's Services?
4. Did the trial court commit reversible error and violate the due process rights of the Intervening Petitioners by refusing to allow them the opportunity to be heard on their issue of threat of substantial danger and harm committed by Mr. Dalton?

Both the Department and Mr. Dalton filed briefs in response and concede that Mother's due process rights were violated;[6] however, neither the Department nor Mr. Dalton take a position with respect to the other issues raised by Mother, the Huffines, and the Scoggins namely because they believe a new hearing is required and such hearing will pretermit Mother's and the Intervenors' other issues. Both the Department and Mr. Dalton, however, ask that this Court to allow Mr. Dalton to continue to serve as the primary residential parent of the children pending a new hearing on remand.

III. Analysis

A parent's right to the care and custody of his or her child is among the oldest of the liberty interests protected by the due process clauses of the federal and state constitutions. *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Hawk v. Hawk*, 855 S.W.2d 573, 578-79 (Tenn. 1993); *Ray v. Ray*, 83 S.W.3d 726, 731 (Tenn. Ct. App. 2001). Although this right is fundamental, and superior to claims of the government and other persons, it is not absolute. *State v. C.H.K.*, 154 S.W.3d 586,

[6] There is no consensus among the parties on the parameters of the due process violations Mother suffered as a result of the truncated hearing. Mother appears only to assert that her due process rights were violated with respect to the court's finding that she committed severe child abuse. While the Intervenors allude to Mother's due process rights, the gravamen of their argument addresses the manner in which the court violated their right to present proof that Father posed a substantial threat of harm to the children. The Department asserts that the court violated Mother's due process rights by denying her the opportunity to present evidence in her defense. Father adopts the argument of the Department "to the extent that Ms. Huffines-Dalton was denied the right to put on evidence beyond her own testimony."

589 (Tenn. Ct. App. 2004). The right continues without interruption only as long as a parent has not relinquished it, abandoned it, or engaged in conduct requiring its limitation or termination, *Blair v. Badenhope*, 77 S.W.3d 137, 141 (Tenn. 2002), such as when the child is found to be dependent and neglected, *see* Tenn. Code Ann. § 37-1-130(a), or when a parent is found to have engaged in severe child abuse, *see* Tenn. Code Ann. § 37-1-130(c).

The fact a child is dependent and neglected and the fact a parent has engaged in severe child abuse must be established by clear and convincing evidence. Tenn. Code Ann. § 37-1-129(c); *Tenn. Dep't of Children's Servs. v. M.S.*, No. M2003-01670-COA-R3-CV, 2005 WL 549141, at *10 (Tenn. Ct. App. Mar. 8, 2005) (holding that despite the lack of a statutory requirement that severe child abuse be shown by clear and convincing evidence, due to the consequences of such a finding the clear and convincing standard must be applied). For the evidence to be clear and convincing, the evidence must eliminate any serious or substantial doubt about the correctness of the conclusions to be drawn from the evidence. *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002) (citing *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n. 3 (Tenn. 1992)). The evidence should produce a firm belief or conviction as to the truth of the allegations sought to be established. *In re M.L.P.*, 228 S.W.3d 139, 143 (Tenn. Ct. App. 2007); *In re Georgianna H.*, 205 S.W.3d 508, 516 (Tenn. Ct. App. 2006). In contrast to the preponderance of the evidence standard, clear and convincing evidence should demonstrate that the truth of the facts asserted is "highly probable" as opposed to merely "more probable" than not. *In re Audrey*, 182 S.W.3d 838, 874 (Tenn. 2005); *see also In re M.A.R.*, 183 S.W.3d 652, 660 (Tenn. Ct. App. 2005) (quoting *In re C.W.W.*, 37 S.W.3d 467, 474 (Tenn. Ct. App. 2000)).

This court reviews the circuit court's findings of fact *de novo* on the record accompanied by a presumption of correctness, "unless the preponderance of the evidence is otherwise." Tenn. R. App. P. 13(d); *In re M.J.B.*, 140 S.W.3d 643, 654 (Tenn. Ct. App. 2004); *see also In re A.T.P.*, No. M2006-02697-COA-R3-JV, 2008 WL 115538, at * 4 (Tenn.Ct .App. Jan. 10, 2008); *In re the Adoption of A.M.H.*, 215 S.W.3d at 808-09; *In re M .L.P.*, 228 S.W.3d at 143-44. If some of the trial court's factual findings are based on its determinations of the credibility of the witnesses, this court will afford great weight to those credibility determinations, and will not reverse such determinations absent clear evidence to the contrary. *See McCaleb v. Saturn Corp.*, 910 S.W.2d 412, 415 (Tenn. 1995); *Whitaker v. Whitaker*, 957 S.W.2d 834, 837 (Tenn. Ct. App. 1997); *see also Walton v. Young*, 950 S.W.2d 956, 959 (Tenn. 1997). Whether dependency and neglect or severe child abuse have been established by clear and convincing evidence, however, are questions of law, which we review *de novo* with no presumption of correctness. *See In re the Adoption of A.M.H.*, 215 S.W.3d 793, 810 (Tenn. 2007); *see also In re Valentine*, 79 S.W.3d at 548.

A. Dependency and Neglect Proceedings

The purpose of a dependency and neglect proceeding is to "[p]rovide for the care, protection, and wholesome moral, mental and physical development of children," and to achieve this purpose within the family environment whenever possible. Tenn. Code Ann. § 37-1-101(a); *Department of*

Children's Services v. T.M.B.K., 197 S.W.3d 282, 289 (Tenn. Ct. App. 2006). A "dependent and neglected child" is a child:

> (A) Who is without a parent, guardian or legal custodian;
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> (B) Whose parent, guardian or person with whom the child lives, by reason of cruelty, mental incapacity, immorality or depravity is unfit to properly care for such child;
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> (C) Who is under unlawful or improper care, supervision, custody or restraint by any person, corporation, agency, association, institution, society or other organization or who is unlawfully kept out of school;
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> (D) Whose parent, guardian or custodian neglects or refuses to provide necessary medical, surgical, institutional or hospital care for such child;
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> (E) Who, because of lack of proper supervision, is found in any place the existence of which is in violation of law;
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> (F) Who is in such condition of want or suffering or is under such improper guardianship or control as to injure or endanger the morals or health of such child or others;
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> (G) Who is suffering from abuse or neglect;
>
> (H) Who has been in the care and control of an agency or person who is not related to such child by blood or marriage for a continuous period of eighteen (18) months or longer in the absence of a court order, and such person or agency has not initiated judicial proceedings seeking either legal custody or adoption of the child; or
>
> (I) Who is or has been allowed, encouraged or permitted to engage in prostitution or obscene or pornographic photographing, filming, posing, or similar activity and whose parent, guardian or other custodian neglects or refuses to protect such child from further such activity.

Tenn. Code Ann. § 37-1-102(b)(12).

The statutes governing dependency and neglect proceedings require two separate phases – adjudication and, if applicable, disposition. Under Tenn. Code Ann. § 37-1-129, the court must first hold a hearing and make findings whether a child is dependent and neglected within the meaning of the statute. "The function of the adjudicatory hearing is to determine whether the allegations of dependency, neglect, or abuse are true." *In re Audrey S.*, 182 S.W.3d 838, 874 (Tenn. 2005); Tenn. R. Juv. P. 28(a). Accordingly, the adjudication is not against either parent or the custodian, but

addresses the question of whether the child is dependent and neglected for any of the reasons enumerated by the statute. During this adjudicatory phase, the parties are "entitled to the opportunity to introduce evidence and otherwise be heard in the party's own behalf and to cross-examine adverse witnesses," Tenn. Code Ann. § 37-1-127(a), and the rules of evidence apply. *See In re Audrey S.*, 182 S.W.3d at 874; Tenn. R. Juv. P. 28(c).

If the court finds the child is not dependent and neglected, then the petition must be dismissed and the court has no jurisdiction to determine custody. Tenn. Code Ann. § 37-1-129(a)(1); Tenn. R. Juv. P. 28(f)(1)(i); *Green v. Green*, No. M2007-01263-COA-R3-CV, 2009 WL 348289, at *5 (Tenn. Ct. App. Feb. 11, 2009) (citing *In re E.P.*, No. W2004-02821-COA-R3-CV, 2005 WL 3343807, at *3-4 (Tenn. Ct. App. December 9, 2005) (no Tenn. R. App. P. 11 application filed)). On the other hand, if the court finds the child to be dependent and neglected by clear and convincing evidence, then the court is to "enter an order adjudicating the child dependent and neglected," Tenn. R. Juv. P. 28(f)(1)(ii), and then either proceed immediately with a dispositional hearing or fix a time for such hearing "to make a proper disposition of the case." Tenn. Code Ann. § 37-1-129(c); Tenn. R. Juv. P. 28(f)(1)(ii). Regardless of the timing of the hearing, "[a] dispositional hearing shall be separate and distinct from the adjudicatory hearing to which it relates." Tenn. R. Juv. P. 32(a).

Making a "proper disposition" requires the court to make a custody decision "best suited to the protection and physical, mental and moral welfare of the child." Tenn. Code Ann. § 37-1-130(a). Accordingly, the purpose of the dispositional hearing is "to determine the proper placement for a child who has been found to be dependent, neglected, or abused." *In re Audrey S.*, 182 S.W.3d at 874 (citing Tenn. Code Ann. § 37-1-130(a); Tenn. R. Juv. P. 32). In making a "proper disposition," the court may permit the child to remain with the child's parent(s), guardian or custodian with conditions and limitations as directed by the court "for the protection of the child." Tenn. Code Ann. § 37-1-130(a)(1). Alternatively, the court may place the child in the custody of any individual whom the court finds "to be qualified to receive and care for the child," including the Department of Children's Services. Tenn. Code Ann. § 37-1-130(a)(2)(A), (B).

At the end of the Department's proof during the adjudicatory phase, the Department's counsel informed the court that all of its remaining evidence related to the disposition of the children if the court found them to be dependent and neglected. From the bench, the court expressed that based on the Department's proof, there were grounds to find the children dependent and neglected with respect to Mother, but not with respect to Father. The court then explained that its understanding of the statute was that if there were no allegations and no proof presented with respect to Father's unfitness the court was required to dismiss the case even though the actions of Mother, the children's custodian, had rendered them dependent and neglected within the meaning of the statute. The court stated, "if he were unfit they would be dependent and neglected, but there is no proof here today and the court has no option under the law but to dismiss this petition as to the father."

The court was of opinion that, since it did not find that the children were dependent and neglected due to any act of Father, it was required to dismiss the petition. This was error. A

dependent and neglect proceeding is not against the parents but, rather, is an inquiry to determine whether the child is dependent and neglected for any of the reasons enumerated by the statute and, if so, the proper disposition of the child. In this case, at the time the proceeding was initiated, Mother was the primary residential parent with Father having visitation rights and the circumstance giving rise to the proceeding was a shooting which occurred in the home of Mother while the children were present. The children were found dependent and neglected due to the acts of Mother and the fact that the finding was not due to the acts of Father did not require the court to dismiss the entire proceeding but, rather, would constitute an appropriate consideration during the dispositional phase.[7]

The parties do not contest the sufficiency of the evidence to support the court's finding that the children were dependent and neglected within the meaning of Tenn. Code Ann. § 37-1-102(b)(12) and we have reviewed the record and the court's findings and determined that the finding that the children were dependent and neglected is supported by clear and convincing evidence.

Upon finding that the children were dependent and neglected, the court was required to hold a separate dispositional hearing and to hear evidence from any of the parties on what the "proper disposition" of the children should be. Because the court failed to conduct the statutorily-mandated dispositional hearing, we must remand the case for the court to conduct such a hearing in accordance with Tenn. Code Ann. §§ 37-1-129(c) and (d) and 37-1-130. At the dispositional hearing the Intervenors and Mother should be permitted to put on proof that placement with Father poses a risk of substantial harm to the minor children.[8]

B. Severe Child Abuse

In the course of the hearing, Mother sought to introduce evidence assertedly relevant to the court's consideration of whether she committed severe child abuse,[9] which the court declined to hear. Mother contends that the trial court erred in not allowing her to put on proof and in finding that she had committed severe child abuse.

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[7] In *Lovell v. Lovell,* No. M2005-02955-COA-R3-CV, 2007 WL 34826 (Tenn. Ct. App. Jan. 4, 2007), a father sought to have his child declared dependent and neglected due to the conduct of the child's mother, the child's primary residential parent. The adjudication that the child was dependent and neglected was based entirely on the mother's conduct.

[8] We express no opinion as to the merits of the claims of Mother and the Intervenors and are mindful that Father, as biological parent has a superior right to custody, and custody cannot be awarded to a third party unless it is demonstrated that the children will be exposed to substantial harm in Father's custody. *See Ray v. Ray*, 83 S.W.3d 726, 732 (Tenn. Ct. App. 2001).

[9] It appears from the transcript of the hearing that the evidence sought to be introduced related to prior orders in the divorce case involving custody issues and that Mother wished to testify in her behalf despite having previously invoked her Fifth Amendment privilege, after further negotiations relative to the pending criminal case.

When a court finds that a child is dependent and neglected on the grounds that the child "is suffering from abuse or neglect," Tenn. Code Ann. § 37-1-102(b)(12)(G), the court must then make a determination "whether the parents or either of them or another person who had custody of the child committed severe child abuse." Tenn. Code Ann. § 37-1-129(a)(2). A finding that a parent has committed severe child abuse has consequences affecting the parent's constitutionally protected right to the care, custody, and control of his or her child such as the potential for mandatory removal of the child from the parent's custody, *see* Tenn. Code Ann. §§ 37-1-130(d) and 37-1-167, and grounds for termination of the parent's parental rights, *see* Tenn. Code Ann. §36-1-113(g)(4). *See Troxel v. Granville*, 530 U.S. at 65 ; *Hawk v. Hawk*, 855 S.W.2d at 578-79; *Ray v. Ray*, 83 S.W.3d at 731. Because Mother's rights to the care, custody, and control of her children are protected by the due process clauses of the federal and state constitutions, the court is required to give the parent an opportunity to be heard. *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914). The hearing must afford the parent "an effective opportunity to defend by confronting any adverse witnesses and by presenting his or her own arguments and evidence orally." *Goldberg v. Kelly*, 397 U.S. 254, 268, 90 S.Ct. 1011 (1970).

The circuit court erred by refusing to allow Mother to present relevant evidence in defense of the charge that she committed severe child abuse. Consequently, we remand the case for a further hearing to allow Mother to present evidence in her defense on the issue of whether she committed severe child abuse as defined by Tenn. Code Ann. § 37-1-102(b)(21). In light of our remand, it is unnecessary to determine whether the court's conclusion is supported by the evidence.

C. Recusal

Mother and the Intervening Petitioners assert that statements made by the court during the hearing indicated a prejudgment of the issues and that the court should have recused itself because of such statements as well as statements regarding the credibility of Mother.

"Litigants, as the courts have often said, are entitled to the 'cold neutrality of an impartial court.'" *Davis v. Liberty Mut. Ins. Co.*, 38 S.W.3d 560, 565 (Tenn. 2001) (citing *Kinard v. Kinard*, 986 S.W.2d 220, 227 (Tenn. Ct. App. 1998)). Thus, one of the core tenets of our jurisprudence is that litigants have a right to have their cases heard by fair and impartial judges. *Id.* As the Tennessee Supreme Court has said, "it is of immense importance, not only that justice be administered ... but that [the public] shall have no sound reason for supposing that it is not administered." *In re Cameron*, 126 Tenn. 614, 151 S.W. 64, 76 (1912). If litigants are to maintain confidence in the judiciary, cases must be tried by unprejudiced and unbiased judges.

The entire record demonstrates that this was an emotional and contentious hearing, with participation by DCS, the children's parents, maternal grandparents and maternal great aunt and uncle; it was held nearly two years after the events giving rise to the proceeding and was itself an appeal of a contested hearing in juvenile court. The comments quoted in Mother's and Intervenors' briefs were made either in the context of ruling on evidentiary objections or in announcing the findings of fact at the conclusion of the adjudicatory phase. Several of the quoted statements were

incorporated into the written findings of fact, which we have determined to be supported by the evidence. Viewing the comments in the context in which they were made, we do not agree that they demonstrate that the court had prejudged the case.

In like fashion, we are not persuaded that the trial court's denial of the motion to recuse amounted to an abuse of discretion. The motion was made in the second day of the hearing as the court was stating its findings at the conclusion of the adjudicatory phase. It arose when counsel for Mother advised the court that, despite Mother's earlier invocation of her Fifth Amendment privilege, Mother would testify if the court would continue the case to allow for depositions, which the court declined to do. In the course of the discussion regarding the continuance, Mother's counsel stated that the court had "announced your finding about the credibility of my client." The court stated, in ruling on the recusal motion:

> But, no, I'm not recusing myself. I'm not biased. I have heard the case that has been presented to me; I've read the pleadings. She refused to testify, and it is now 9 minutes until 12:00, and apparently she is still not ready to take the stand. I've made an offer that if she wants to put on evidence, take the stand right now, I will swear her in that she may put on her evidence. I haven't cut her off. I am giving you one last chance. Is she going to take the stand now, or is she invoking her constitutional right not to testify if it may be self-incriminating?

The decision to recuse "rests within the sound discretion of the trial judge and its decision will be upheld unless a clear abuse of discretion is established." *Curry v. Curry*, No. M2007-02446-COA-R3-CV, 2008 WL 4426895, at *7 (Tenn. Ct. App., Sept. 18, 2008) (citing *State v. Raspberry*, 875 S.W.2d 678, 681 (Tenn. Crim. App. 1993)). A judge should recuse himself or herself in a case in which the judge's impartiality, or ability to preside impartially, can reasonable be questioned. *Lofton v. Lofton,* No. W2007-01733-COA-R3-CV, 2008 WL 5423985, at *3 (Tenn. Ct. App. Dec. 30, 2008). Viewing the comments of the judge (as well as those of counsel) in the context of the entire record, we do not believe they show bias on the part of the court or support a determination that the court did not impartially consider the evidence and issues in this case. As such, the court did not abuse its discretion in denying the recusal motion.

D. Evidentiary Matters

Mother raises concerns about two evidentiary matters: (1) the court's refusal to allow Mother to make an offer of proof of an Affidavit of Complaint Mother made against Father, which affidavit was a part of the TBI investigative record and (2) the trial court's disallowance of questions regarding the authenticity of an audiotape played at trial.

1. Mother's Offer of Proof

In the course of his cross-examination, TBI Agent Winkler was asked by Mother's counsel to read an Affidavit of Complaint that Mother made when she swore out a domestic assault warrant

against Father two days after the August 18, 2006, incident; a copy of the affidavit was a part of Agent Winkler's investigative file.[10] When the court sustained a hearsay objection to the affidavit, Mother's counsel attempted to make an offer of proof of the affidavit; counsel did not state the reason for which the evidence was sought to be admitted.[11] The court refused to accept into the record an offer of proof, stating:

> This affidavit is not going to be allowed as an offer of proof. You are trying to substitute proof. Your client can take the stand and I will listen to her live. We are not going to be cross examining some affidavit because these people have the right to confront the witnesses. And these children have a right to have their attorneys confront their witnesses.

The purpose of an offer of proof is to allow the party whose evidence has been excluded to preserve for appellate review the issue of whether the evidence should have been excluded. Rule 103(b), Tenn. R. Evid., provides that the court should allow the offer of proof in question and answer form. As noted in *Alley v. State,* 882 S.W.2d 810 (Tenn. Crim. App. 1994), "courts are required, in appropriate circumstances, to allow offers of proof when evidence is excluded so as to enable consideration of the issue on appeal." 882 S.W.2d at 815-16.

We are of the opinion that the court erred when it did not allow Mother to make the offer of proof. While the court was free to sustain the objection, it should have allowed the affidavit to be introduced into the record for review purposes. We do not pass judgment on any issue as to the admissibility, relevance or weight to be assigned to the evidence and, in light of our remand of this case for further hearing, it is unnecessary for us to determine whether a substantial right of Mother was affected by the exclusion of the evidence. *See* Tenn. R. Evid. 103(a).

2. Questions Regarding the Authenticity of the Audiotape

In the course of Agent Winkler's direct examination, he played an audio recording of the incident. In establishing the foundation for playing the recording, he explained that it was "a digital recording that [Father] made on the 18th of August, 2006 when he went to his ex-wife's house to pick his kids up. . . . it is a digital recording made on a digital recorder." No objection was made to this testimony or to the playing of the recording. Mother complains that the court erred in sustaining DCS' objection to Mother's questioning Agent Winkler on cross-examination regarding the chain of custody of the recording which questioning, she contends, was intended to challenge the authenticity of the recording and show "potential selective re-recording of the 'original' tape."

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[10] Agent Winkler was an assistant special agent of the TBI at the time of the hearing; at the time of the incident he was a field agent assigned to the13th and 15th districts and had been assigned to prepare the investigation of the shooting for trial.

[11] In her brief on appeal, Mother contends that the affidavit "would be admissible to show [Mother's] state of mind at the time she made the affidavit."

Authenticity as a prerequisite to the admission of evidence is achieved when the court receives evidence showing that "the matter in question is what its proponent claims." Tenn. R. Evid. 901(a). At the time the recording was introduced, no objection or request to conduct *voir dire* of Agent Winkler was made by Mother (or any party); consequently, any objection to the authenticity or admissibility of the recording was waived.

Inasmuch as the recording had been admitted without objection, Mother's questions relating to possible "selective re-recording" of the original recording could only address the weight to be afforded to the recording by the trier of fact. Agent Winkler had testified on direct examination:

> What is unique about a digital recording is that each time you stop...if you make a recording and you stop the recorder and then you start if back again then it creates a separate file than the one that you were previously recording. So what is unique about that in this particular case this incident between him and his ex-wife is all contained on one file, which would indicate that there was no stopping and starting of the recorder during their contact.

He also testified that he had interviewed Father and that Father's statements of the events at Mother's house were consistent with the content of the recording. There was evidence in the record of how Agent Winkler came into possession of the recording and the custody of it since being made.

The standard for reviewing a trial court's evidentiary decisions was set forth by this Court in *White v. Vanderbilt Univ.,* 21 S.W.3d 215 (Tenn. Ct. App. 1999) as follows:

> The admission or exclusion of evidence is within the trial court's discretion. *See Seffernick v. Saint Thomas Hosp.,* 969 S.W.2d 391, 393 (Tenn. 1998); *Otis v. Cambridge Mut. Fire Ins. Co.,* 850 S.W.2d 439, 442 (Tenn. 1992). The discretionary nature of the decision does not shield it completely from appellate review but does result in subjecting it to less rigorous appellate scrutiny. *See Tennessee Dep't of Health v. Frisbee,* No. 01A01-9511-CH-00540, 1998 WL 4718, at *2 (Tenn. Ct. App. Jan. 9, 1998) (No Tenn. R. App. P. 11 application filed); *BIF v. Service Constr. Co.,* No. 87-136-II, 1988 WL 72409, at *2 (Tenn. Ct. App. July 13, 1988) (No Tenn. R. App. P. 11 application filed). Because, by their very nature, discretionary decisions involve a choice among acceptable alternatives, reviewing courts will not second-guess a trial court's exercise of its discretion simply because the trial court chose an alternative that the appellate courts would not have chosen. *See Overstreet v. Shoney's, Inc.,* 4 S.W.3d 694, 708 (Tenn. Ct. App. 1999).

21 S.W.3d at 222-23.

The right to introduce evidence is not absolute and is subject to control by the trial court, in the exercise of its discretion. In this case, the judge felt that the specific questions regarding the

custody of the recording was directed toward discovery for the criminal case[12] and there is no evidence to suggest that the recording was in any way doctored. There was sufficient evidence in the record from which the court could make a determination of the weight to be afforded the recording.

It was within the court's discretion to sustain the objection to the particular questions and the record does not show an abuse of that discretion.

IV. Conclusion

For the foregoing reasons, we affirm the court's finding that the children are dependent and neglected. We remand the case for a further hearing on the disposition of the children and on the court's inquiry pursuant to Tenn. Code Ann. § 37-1-129(a)(2). Pending such hearing, the order of the court granting custody to Father shall remain in effect.

Costs are divided equally between the parties.

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RICHARD H. DINKINS, JUDGE

[12] The court stated:

> This is an adjudicatory hearing; we're not going through chain of custody. We're not doing any kind of pretrial for your criminal case.